

5 KEY TAKEAWAYS

ESG Advertising and Endorsement Guides Updates

[Barry M. Benjamin](#), managing partner of the New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, was honored to co-present with Laura Brett, Vice President and New York Office leader at BBB National Programs, at a Hot Topics in Advertising Law discussion. They discussed recent events in advertising law around Environmental, Social, and Governance (ESG) advertising claims, as well as the FTC's recent proposed updates to its Endorsement Guides, and advised on how to limit risk in today's highly engaged advertising marketplace. Takeaways from the program include:

1

The NAD is Monitoring: The National Advertising Division (NAD) of the BBB National Programs was founded in 1971 as a system of independent industry self-regulation to build consumer trust in advertising, and support fair competition in the marketplace. NAD holds national advertisers to high standards of truth and accuracy, by reviewing challenges from businesses, trade associations, and consumers, as well as initiating its own reviews. NAD recently initiated its own review of social justice-related advertising claims by DoorDash as well as Niantic (maker of Pokémon GO), and found substantiated each company's claims of donating to various entities supporting social justice oriented endeavors.

2

View Advertising from the Consumer's Perspective: As with all advertising, the truth or falsity of a claim is always evaluated from the consumer's perspective. It does not matter what the company intended to say or not say in its advertising—rather, what matters is what the consumer perceives the advertisement to mean. The Sixth Circuit recently re-emphasized this principle in a case involving environmental claims and the FTC: “[T]he scientific validity of a consumer's belief is not the standard for reasonableness. Rather, in considering charges of false and deceptive advertising, the public's impression is the only true measure of deceptiveness.” *ECM BioFilms, Inc. v. Federal Trade Comm'n*, 851 F.3d 599 (6th Cir. 2017)

3

Take Care with Aspirational Claims: Companies often make aspirational claims about their future environmental benefit activities, whether by reducing plastic use, increasing recycling efforts, or using less water and limiting waste during the manufacturing process. While aspirational claims may seem like puffery, if the reasonable consumer takes one to mean something specific, then the advertiser still needs substantiation for the claim. If, for example, a beverage company that sells billions of product in plastic bottles makes extensive plastic-reduction and eco-friendly claims and promises, it may be called to account for those claims and promises in court. Do not lightly make aspirational claims and assume consumers (or other interested parties) will not challenge them.

4

Endorsement Guides Proposed Updates: In May, 2022, the Federal Trade Commission published proposed updates to its Endorsement Guides. Last updated in 2009, before anyone knew what an ‘influencer’ was, the proposed updates tighten up, are more specific, and go deeper than the 2009 version. The proposals include clarifications on who legally qualifies as an endorser covered by the guides, when a material connection is required to be disclosed, and how to disclose material connections to ensure consumers can properly weigh the value of an endorsement.

5

Who is Responsible for Compliance with the Endorsement Guides? Everyone: The FTC also clarified that, in their view, everything and everyone involved in social media and endorsements is required to ensure compliance with the Endorsement Guides. That means not only the influencer or expert making the endorsement, the advertiser whose product or service is being endorsed, and the advertising agency that connected the influencer and advertiser, but also the platform on which a social media endorsement may be encountered. Specifically, the FTC is keeping a sharp eye out to see whether platform tools built to facilitate the disclosures required by the Guides adequately apprise consumers of the connection between an influencer and advertiser.

Advertising in the ESG area is not new, but the laser focus on ESG claims may be. Companies should take special care to ensure that what formerly may have been broad, non-specific statements of support for the environment, social justice causes, and good government issues, does not turn out to be a hornet's nest of liability because consumers construed them to be more specific. As always, it is a straightforward matter of being intentional—when marketers or PR professionals throw around otherwise bland statements, take care that those statements have limited and clear meanings and, if necessary, ensure the company has substantiation supporting any reasonable consumer take-aways. It is not “just marketing”—it could lead to liability.

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